Petition

81-1111

No.

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In the Supreme Court of the United States

October Term, 1981

FRANK L. JOHNS,
Petitioner,

vs.

THE STATE OF OHIO, and THE SUPREME COURT OF OHIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTIONS PRESENTED

Petitioner presents the following questions for determination:

(1) Does the Supreme Appellate Court of each state, in this case the Supreme Court of Ohio, have a duty to accord to all litigants their right to due process of law, and to the equal protection of the law, guaranteed by the Fourteenth Amendment to the Constitution of the United States?

(2) Does such Supreme Appellate Court, sitting in that capacity, accord to the petitioner a hearing within the meaning and requirement of due process when that court undertakes to arrive at a decision on the basis of issues which at no stage, and before no court, have been raised, briefed, or argued by either litigant; and despite such court's long-standing rule excluding from any consideration issues which were not decided below, nor raised, briefed or argued before it, thus excluding any opportunity to confront and to be heard on such issues?

(3) When petitioner was convicted of a crime of which he was totally innocent, and after six-and-a-half years imprisonment was released on habeas corpus by the Sixth Circuit Court of Appeals, and thereafter the State of Ohio, by it's General Assembly, enacted special legislation solely for the benefit of petitioner which directed determination by the Ohio Court of Claims as to *whether* petitioner had been unlawfully imprisoned by the state, and upon the trial of such issue the judgment of the Sixth Circuit Court of Appeals is offered as proof, does the Supreme Court of Ohio accord to petitioner due process and equal protection by first expressing its extreme dislike of such special legis-

lation and by then undertaking, as a basis for its decision, to formulate purely fictitious and spurious issues, having no relation to any aspect of petitioner's case presented at any level, and refusing to follow and to apply the decision of the United States Supreme Court in *Cuyler v. Sullivan* (1980), 100 S. Ct. 1708, 446 U.S. 335?

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OPINIONS BELOW

Set forth in the appendix to this petition are the final opinion of the Ohio Court of Claims, the opinions of the Court of Appeals of Franklin County, and the opinion of the Supreme Court of Ohio.

JURISDICTIONAL STATEMENT

Petitioner appeals from the final judgment of the Supreme Court of Ohio dated July 22, 1981, reversing the judgment of the Court of Appeals of Franklin County, Ohio, and effectually dismissing and finally disposing of petitioner's action against the State of Ohio, by thereafter, on September 16, 1981, denying the petitioner's motion for

a rehearing. By the manner of its disposition of an appeal to the Supreme Court of Ohio by the State of Ohio, that court has denied to the petitioner basic rights to due process of the law and the equal protection of the law. Jurisdiction of this court accordingly arises under Title 28, Section 1257(3) of the United States Code, and under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Amendment Fourteen to the Constitution of the United States, as pertinent hereto, provides:

> "No state shall make or enforce any law which shall abridge the privileges or any immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 12(A) of the Ohio Rules of Appellate Procedure, pertinent hereto:

> "The appeal shall be determined on its merits, on the assignments of error set forth in the briefs . . . all errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error."

Section 41 of Amended Substitute Senate bill No. 221:

> "Notwithstanding the provisions of chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio 44105, is hereby authorized to file a claim for damages in the Court of Claims for lost wages, legal expenses, and general damages resulting from his alleged unlawful incarceration.

The Court of Claims, after all the evidence in support of this claim has been heard, shall determine:

(1) Whether the preponderance of evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by the State of Ohio, and if this is so,

(2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any award for damages made to Mr. Johns by the Court of Claims."

STATEMENT OF THE CASE

In 1965 the petitioner was indicted on two counts for allegedly possessing for sale and allegedly selling $15 worth of marijuana. In fact, at the time the alleged offense occurred, the petitioner was at work on one of two jobs in which he was then employed. In fact, his employment records fully substantiated this. He retained private counsel.

On trial, his counsel failed to subpoena any of the employment records which would have presented a complete defense to the charges. Previously, the petitioner had never been indicted or charged with any offense. On trial, he was convicted on both counts by a jury. Notwithstanding the nature of the charge, and the petitioner's past record, he was sentenced to serve consecutive sentences.

Without assistance of counsel he made numerous attempts to succeed on petitions for habeas corpus, addressed first to state courts, and then to federal courts. None succeeded until, with the assistance of assigned counsel, he reached the Sixth Circuit Court of Appeals. That court, in the case of *Johns v. Perini* (1972), 462 F.2d 1308, or-

dered the District Court to issue a writ of habeas corpus, stating:

> "We consider for the second time Johns' appeal for dismissal of his petition for a writ of habeas corpus. It presents for our determination the constitutional fairness of the proceedings which resulted in the imprisonment of this forty year old man, with no previous criminal conviction, for the term of thirty to sixty years for the sale of $15 worth of marijuana. We conclude that the writ should issue."

Special State Legislation Enacted

Petitioner served 6½ years imprisonment in an Ohio penitentiary from 1965 to 1972. By the time he was released, every cause of action that might have been available to him was banned by the pertinent statute of limitations.

The only recourse available was an appeal to the Ohio Legislature. This two chamber body was so outraged by the entire circumstances as to adopt a bill for the sole benefit of the petitioner, above set forth, page 2. The legislature was so clearly confident concerning the inevitable outcome of the litigation which the petitioner was authorized to institute as to provide an unlimited source of funds for payment of whatever judgment in his favor would eventually be rendered.

It should be explained that there are no judges on the bench of the Ohio Court of Claims. For each case coming before that court the Supreme Court assigns a trial judge from one of the eighty-eight counties of the state.

The litigation which ensued has now extended over a period of almost five years. Twice a judge assigned to the

Court of Claims undertook to dismiss the case, in each instance asserting that, notwithstanding the jurisdiction resulting from the special legislation, and notwithstanding the mandate of the General Assembly, petitioner had no case to try. Twice the Court of Appeals unanimously reversed those decisions and remanded the case for trial.

RAISING A FEDERAL QUESTION

The federal question first arose as a result of the action of the Ohio Supreme Court. No federal question existed in this case until the Supreme Court of Ohio rendered its opinion and judgment as the court of last resort. The federal question was then raised by petitioner's motion for rehearing, from which we quote:

> "Only two months ago this court pointed out, in the case of *Hospitality Motor Inns v. Gillespie*, 66 Ohio St. 2d 206, that 'it is well settled that an appeals court will not consider a question not presented, considered, or decided by a lower court.' This is the established law in this state.
>
> During oral argument, appellee's counsel was queried on this point and undertook to point out this established principle. Counsel also pointed out that failure to adhere to the principle inevitably causes the reviewing court to become an adversary, deciding a case upon issues which the 'unsuccessful' litigant is given no opportunity to argue or refute, and which, in fact, as in this case, were non-existent.
>
> In the light of the foregoing, the decision of the court constitutes a denial to the appellee of due process under the United States Constitution. A denial of due process inevitably constitutes a denial of civil rights."

REASONS FOR GRANTING THE WRIT

Reaction of Ohio Supreme Court

The Ohio Court of Appeals said:

> "A point of law or fact which was actually and directly in issue in a former action between the same parties may not be relitigated but is binding in a subsequent action. *Trautwein v. Sorgenfrei* (1979), 58 Ohio St. 2d 493. The issue of unlawful incarceration was determined against the State of Ohio in the habeas corpus action.
>
> *Thus, by virtue of the binding effect of the determination of unlawful incarceration in the habeas corpus action, there was proof by a preponderance of the evidence that appellant was unlawfully incarcerated by the State of Ohio and the trial court failed to follow the mandate of the Ohio General Assembly in concluding that appellant had no lawful cause of action.*" (Emphasis added.)

This issue and its determination was completely ignored in the spurious issues raised by the Ohio Supreme Court.

The decision of the Ohio Supreme Court, reversing the Court of Appeals and effectually dismissing the petitioner's case, can best be described as a product of legal malice. This unfortunate circumstance is demonstrated both by the action of the court depriving the petitioner of a fair hearing, as well as by a complete disregard of the issues presented, and purported decisions upon wholly fictitious issues:

(A) At the time of the oral argument, counsel for the petitioner was unaware of a fact which should have caused a member of the court to disqualify himself from

participating in the determination of this case. Recently it was learned that during the entire proceeding, trial and appeal, of *Johns v. Perini*, the State of Ohio was represented by Attorney General Paul Brown. The office of the attorney general bitterly opposed the action of the Ohio Legislature for the benefit of the petitioner, during its pendency before that body. Paul Brown was one of the justices constituting the majority of the Ohio Supreme Court when this case was argued and decided. Paul Brown was the justice who, during oral argument, queried petitioner's counsel concerning the right of the Court to decide the case and to determine questions on the basis of issues not presented, considered or decided by any lower court.

To do so, as subsequently noted in petitioner's motion for rehearing, was in direct violation of the Court's own rules and established law. The opinion of the Court and its final dismissal of the case indicated that the Court well knew at the time of oral argument the purported issues which the Court would presume to determine. Yet no indication of those issues was revealed, and no opportunity afforded to document or to argue the established law.

(B) The Ohio Supreme Court has established a rule to the effect that a writ of habeas corpus may not be granted to a state prisoner for a violation of any constitutional right. This has been noted by that Court many times. As recently as July 1, 1981, the defendant court stated in case of *State v. Ishmail*, 67 Ohio St. 2d 16:

> "Under the doctrine of res judicata a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment any defense or any claimed lack of due process that was raised, or could have been raised, by the defendant at the trial which resulted in that judgment of conviction or on an appeal from the judgment."

A recent issue of *Law and Fact*, the monthly publication of the Cuyahoga County Bar Association, notes that "our Court has insisted on its prerogative of 'distinguishing the precedent' to avoid applying the U.S. Constitutional standard to Ohio cases. The result has been a massive collateral attack upon the Ohio system by convicted defendants who use the writ of habeas corpus to try in federal court the issue of whether their conviction met U.S. Supreme Court standards."

This necessary practice has from time to time met the publicly expressed hostility of the court, assuredly well known to the justice who had participated in the petitioner's case as counsel for the state.

(C) Contrary to the unanimous decision of the Court of Appeals applying *Cuyler v. Sullivan*, 100 S. Ct. 1708 446 U.S. 335, to the issue of state responsibility for the unlawful imprisonment of the petitioner, the Supreme Court of Ohio casually dismissed the rule of law announced by the United States Supreme Court applicable to the only *factual issue* before it.

(D) In its opinion, the Court said: *"Cuyler v. Sullivan . . .* does not give him (petitioner) a right of civil action against the state government based solely upon the alleged shortcomings of such counsel." (No such claim was ever made.) The liability of the state was created by special act of the legislature, as the Court well knew.

Further, the Court said in its opinion "the argument that Johns v. Perini is res judicata misses the mark completely. The point is that the decision in Johns v. Perini does not make the state liable." (No such claim was ever made.) The issue before the Supreme Court was the right to affirmance of the established rule applying the principle of estoppel by judgment on the issue of unlawful imprisonment decided in Johns v. Perini. Certainly the Court well knew this.

(E) In Ohio, the syllabus of the Supreme Court cases constitutes a statement of the principles of the law involved and decided in the case. The above two spurious legal issues appear in the syllabus of the Ohio Supreme Court in this case although the court well knew they were neither involved, briefed, argued, or related to any issue presented.

(F) On a trial of the case in the Court of Claims, expert and uncontradicted testimony established that the petitioner's economic loss alone exceeded $390,000. The general hostile and legally malicious reaction of the defendant court to this evidence is found in its opinion in the following remark:

> *"There is no presumption that a released prisoner is entitled to a key to the public treasury."* (Emphasis added.)

(G) In a final attempt to justify its disposition of this case on the basis of spurious issues, the defendant court made so bold as to "interpret" the clear language of the special bill of the legislature by changing the words "*whether* Johns was unlawfully imprisoned" by the state to *why*: "whether the state of Ohio was responsible for Johns' incarceration *in such a way* as to warrant any discretionary payment of tax dollars to him." This deliberate misconstruction of the simple word "whether" was subsequently pointed out to the defendant court in petitioner's motion for rehearing as a violation of its own established rule in *Slingluff v. Weaver* (1902), 66 Ohio St. 621:

> "The intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation . . . that body should be held to mean what it

has plainly expressed, and hence no room is left for construction . . . the office of interpretation is to bring sense out of the words used and not bring a sense into them."

It is both singly, and in totality, the above actions of the court that establish legal malice upon the part of that court in denying to the petitioner his constitutional rights.

We sum up from the decisions of this Court situations in which a litigant may, and should, be found to have been deprived of rights guaranteed by the Fourteenth Amendment as a result of enunciated action upon the part of a state court:

(1) Where something 'more than a possible misconstruction' of state law has taken place.

(2) Where 'the judgment amounts to mere arbitrary or capricious exercise of power' or 'is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.'

(3) Where the judgments of the state courts 'were so plainly arbitrary and contrary to law as to be acts of mere spoliation.'

(4) Where the state court did 'candidly deny to one litigant a rule of law which it concededly did apply to all other litigants in similar situations.'

This case falls within each of the above stated categories.

In *Snowden v. Hughes* (1944), 321 U.S. 1, 64 S. Ct. 397, Justice Frankfurter declared:

"And if the highest court of a state should candidly deny to one litigant a rule of law which it did concededly apply to all other litigants in similar situ-

> ations, could it escape condemnation as an unjust discrimination and therefore a denial of equal protection of the laws?"

And in *Rogers v. Alabama* (1904), 192 U.S. 226, 24 S. Ct. 257, this Court said:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

This is precisely the situation in which the petitioner finds himself after the creation of a special remedy for his benefit by the legislature of Ohio, acting on behalf of the people of Ohio, the subsequent denial of a fair hearing and the refusal of the defendant court to apply and to follow *Cuyler v. Sullivan.*

CONCLUSION

Since the petitioner does in fact have constitutional rights which have been violated, should this court elect not to intervene, then in fact such rights do not exist.

The absence of a remedy has heretofore been noted by this Court to be tantamount to the absence of a right.

Petitioner asks a reversal of the judgment of the Ohio Supreme Court; seeks a direction and order to that court that a decision rendered upon issues which were concealed from counsel during oral argument and which counsel were at no time afforded an opportunity to document or to argue is a denial of due process; seeks an order and direction that the disposition and determination of a cause upon issues which are spurious and have no relation to either the facts or the law of the case is a denial of due process; that failure to follow and apply established rules

of law, which the court continues unchanged, when such rules have candidly been applied by it in all other cases is a denial of equal protection; and that the decision of this Court in *Cuyler v. Sullivan* must be followed and is determinative of the sole factual issue before the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided July 22, 1981)

No. 80-1450

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

FRANK L. JOHNS,
Appellee,

vs.

STATE OF OHIO,
Appellant.

Claim for damages authorized by legislative mandate—Hearing on merits required—Court of Claims—Unlawful incarceration—Res judicata not applicable.

1. A defendant has no common-law claim against the state for damages after he has obtained his release upon a writ of habeas corpus for violation of his constitutional rights.

2. Such judgment in habeas corpus is not *res judicata* upon the issue of whether the state is responsible for the unlawful incarceration in such a way as to warrant a discretionary payment to the defendant pursuant to a special statute enacted after his final release.

APPEAL from the Court of Appeals for Franklin County.

This civil case had its genesis in the Court of Common Pleas of Cuyahoga County upon the conviction, sentence,

and subsequent six and one-half year incarceration of Frank L. Johns, appellee herein, for the crime of selling marijuana on November 30, 1964. After exhausting his state remedies, Johns filed an original action in habeas corpus in the federal District Court. He claimed that his privately-retained personally-selected lawyer had afforded him inadequate representation of counsel in the sole particular of his claim of alibi.

The District Court dismissed the petition, finding adequate representation, in that such private counsel had telephoned Johns' place of employment and was assured that Johns' employment records were not conclusive either way on the question of whether Johns was at work at the time of the alleged crime. Thus counsel had no essential duty to subpoena the records.

Upon appeal, the Sixth Circuit Court of Appeals reversed, declaring that it was the duty of private counsel to subpoena all the employment records because they might have created a reasonable doubt. Holding that the petitioner was deprived of his constitutional right to the effective assistance of counsel, the federal Court of Appeals remanded the case to the state courts "with instructions to grant the writ unless the time cards can be located to permit a fair re-trial." *Johns v. Perini* (C.A. 6, 1972), 462 F. 2d 1308, at 1315. The federal Court of Appeals observed that "[t]he seriousness of the omission is emphasized by the fact that the employer routinely destroys time cards after five years." *Id.*

The Ohio authorities were unable to prosecute Johns and he was released.

Through counsel, Johns unsuccessfully attempted to persuade the General Assembly to enact a moral claim Bill, but ultimately was successful in the passage of Am. Sub. S. B. No. 221, which provides, in part, as follows:

"Section 41. Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio, 44105, is hereby authorized to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses and general damages resulting from his alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine: 1) whether the preponderance of the evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by the State of Ohio, and if this is so, 2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any award for damages made to Mr. Johns by the Court of Claims. Such claim for damages must be filed prior to July 1, 1979, after which date the authority to file such claim shall expire."

Johns filed a complaint in the Court of Claims subsequent to the enactment of this Bill, and the Court of Claims entered a summary judgment against him. This judgment was reversed by the Court of Appeals for Franklin County, which observed:

"Whether the decision of the Sixth Circuit Court of Appeals in effect held the judgment of conviction void or voidable, or whether such judgment is *res judicata* for purposes of the issues raised herein, will not be discussed at this time in that it is not necessary to do so. The Court of Claims, and this court, must consider the rights of this particular claimant in light of the special legislation enacted which creates his cause of action.

"The legislation dealt with here is very clear as to the duty of the Court of Claims. The court must, according to the wording of the bill, first hear all of the evidence in support of the claim, and it then must determine 'whether the preponderance of the evidence offered supports a find-

ing that Mr. Johns had been unlawfully incarcerated by the State of Ohio.'

"Further, if the court so finds upon all of the evidence adduced that Mr. Johns was unlawfully incarcerated, then the court must determine dollar amount damages to be awarded as compensation. Here, the Court of Claims decided this cause upon summary judgment, and did not permit plaintiff to submit any evidence upon the issue of unlawful incarceration. How then can it be said that the legislative mandate to hear all of the evidence and determine by the preponderance of the evidence whether Mr. Johns had been unlawfully incarcerated has been carried out? We must hold that the reasonable intent of the legislative enactment was for the Court of Claims to entertain and review the evidence on the issue of the unlawful incarceration, and to make its determination as to whether justice had been done in the trial of the cause of Mr. Johns. * * *"

Upon rehearing in the Court of Claims, counsel for Johns did not adduce evidence as to whether Johns had been unlawfully incarcerated by the state of Ohio, and objected to all evidence except that which went to the issue of damages. This time the Court of Claims entered judgment in favor of the state of Ohio because it had no evidence to review on the first issue in the legislative mandate. Johns through counsel had claimed that the judgment in habeas corpus entered by the federal Court of Appeals was *res judicata* upon that issue.

Upon appeal of this second Court of Claims' judgment, the Court of Appeals, composed of a different panel, departed from "the law of the case"[1] which it had spelled out

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1. See *Bane v. Wick* (1856), 6 Ohio St. 13; and the cases collected in 5 Ohio Jurisprudence 3d 307, Appellate Review, Section 648; 5 American Jurisprudence 2d, Appeal and Error, Sections 744-759.

in the first review, and based its judgment on the sole proposition that the federal Court of Appeals judgment in habeas corpus was *res judicata* upon the issue of "unlawful incarceration by the State of Ohio." This time the Court of Appeals reversed and remanded the case with instructions to the Court of Claims to hear only evidence as to Johns' damages.

This cause is now before this court upon the allowance of a motion to certify the record.

Mr. Edwin F. Woodle, for appellee.

Mr. William J. Brown, attorney general, and *Mr. Warren M. Enders,* for appellant.

PUTMAN, *J.* A defendant has no common-law claim against the state for damages after he has obtained his release upon a writ of habeas corpus for violation of his constitutional rights. See *Tymcio v. State* (1977), 52 Ohio App. 2d 298.

Cuyler v. Sullivan (1980), 446 U. S. 335, recently held that the right of the accused to adequate representation of counsel includes the counsel which he personally selects and privately retains. However, this does not give him a right of civil action against the state government based solely upon the alleged shortcomings of such counsel.

In the case *sub judice,* the General Assembly did not attempt to vote Johns an unconditional grant of a specific sum as a "moral claim" or upon any other basis. Whether it could have done so in such a case is not before us and we make no decision thereon.

The General Assembly, aware of *Johns v. Perini, supra,* and its conditional nature, limited its grant of access to the public treasury to the prior condition that the Court of Claims hear the evidence *de novo* upon whether justice

had been done in Johns' state trial. The argument that *Johns v. Perini, supra,* is *res judicata* misses the mark completely. The point is that the decision in *Johns v. Perini, supra,* does not make the state liable nor does it obligate the General Assembly or limit it in the options it has available to impose as a precondition of its discretionary opening of the public treasury. The General Assembly understands that evidentiary restrictions coupled with the heavy burden of proof upon the state frequently lead to final releases from imprisonment irrespective of actual innocence of the accused or objectionable conduct on the part of the government.

There is no "presumption" that a released prisoner is entitled to a key to the public treasury. The General Assembly intended to defer to the Court of Claims on the separate question of whether the state of Ohio was responsible for Johns' incarceration in such a way as to warrant any discretionary payment of tax dollars to him. Upon that question no prior judicial decision could be *res judicata.* That issue could not have been ligated in *Johns v. Perini, supra.*

In its opinion in the first appeal, the Court of Appeals for Franklin County correctly captured and clearly restated that unequivocal legislative purpose. In the second appeal of this cause, that court, comprised of a different panel, erroneously departed from "the law of the case" it had previously correctly declared.

The Court of Claims correctly followed the mandate of the Court of Appeals when, upon retrial, it entered a judgment in favor of the state upon the plaintiff having failed to adduce any evidence on the first issue in the legislative mandate.

Accordingly, the judgment of the Court of Appeals for Franklin County is reversed.

Judgment reversed.

CELEBREZZE, C. J., W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

PUTMAN, J., of the Fifth Appellate District, sitting for HOLMES, J.

CLIFFORD F. BROWN, J., dissenting. The issue of the unlawful incarceration of Frank Johns was determined against the state of Ohio in the habeas corpus action in the United States Court of Appeals in *Johns v. Perini* (C.A. 6, 1972), 462 F.2d 1308. To contend that *Johns v. Perini, supra,* is not *res judicata* misses the mark. The Court of Appeals for Franklin County hit the bull's eye by concluding that the determination of unlawful incarceration in the habeas corpus action in the federal court constituted proof by a preponderance of the evidence that Johns was unlawfully incarcerated by the state of Ohio, and that the trial court failed to follow the mandate of the Ohio General Assembly in concluding that Johns had no claim for relief.

To hold otherwise than the Court of Appeals below is to disregard the recent pronouncement of this court in *Trautwein v. Sorgenfrei* (1979), 58 Ohio St. 2d 493, which held that a point of law which was actually and directly at issue in a former action between the same parties may not be relitigated but is binding in a subsequent action. See, also *Hicks v. De La Cruz* (1977), 52 Ohio St. 2d 71; *Columbus v. Union Cemetery* (1976), 45 Ohio St. 2d 47.

It is immaterial that the issue determined in the prior action between the same parties to the action was made

by the United States Court of Appeals rather than by a state court where the present action is being determined. *Symons v. Eichelberger* (1924), 110 Ohio St. 24; *Horne v. Woolever* (1959), 170 Ohio St. 178, paragraph six of the syllabus.

The grant of the extraordinary writ of habeas corpus is for the purpose of conclusively determining the illegality of the restraint or custody under which a prisoner is held, *i.e.*, unlawful incarceration. This grant of habeas corpus relief authorized release from confinement. It was a successful collateral attack nullifying the original judgment and sentence. *Bar Assn. v. Steele* (1981), 65 Ohio St. 2d 1; *In re Lockhart* (1952), 157 Ohio St. 192; *State v. Dean* (1958), 107 Ohio App. 219, 225-226; 49 Corpus Juris Secundum 792, 809. See, generally, *Fay v. Noia* (1962), 372 U. S. 391.

Cuyler v. Sullivan (1980), 446 U. S. 335,[2] and *Tymico v. State* (1977), 52 Ohio App. 2d 298, are no aid in determining the issue we must decide here.

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2. *Cuyler v. Sullivan, supra,* holds, at page 343:

"[A] state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. * * * Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. * * * When a State obtains a criminal conviction through such a trial, it is the State that *unconstitutionally deprives the defendant of his liberty.* * * *" (Emphasis added.)

The above language, by holding that inadequate legal assistance guaranteed by the Sixth Amendment constitutes unconstitutional deprivation of defendant's liberty, is the equivalent of holding that such ineffective legal assistance resulting in confinement is unlawful incarceration. The rationale of *Cuyler* supports the contention of appellee Johns.

DECISION OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

(Rendered August 14, 1980)

No. 79AP-888

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

FRANK L. JOHNS,
Plaintiff-Appellant,

v.

STATE OF OHIO,
Defendant-Appellee.

McCORMAC, *J.*

Appellant was incarcerated by the State of Ohio for approximately 6-1/2 years following his criminal conviction in state court. He was then released upon the granting of his petition for a writ of habeas corpus by the United States Court of Appeals because the State of Ohio had violated appellant's constitutional rights to due process of law under the United States Constitution.

Following appellant's discharge from prison pursuant to the writ of habeas corpus, the Ohio General Assembly enacted a bill authorizing appellant "to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses and general damages resulting from his alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine (1) whether the preponderance of the evidence offered supports a finding

that Mr. Johns has been unlawfully incarcerated by the State of Ohio, and if this is so, (2) the dollar amount of damages to be awarded as compensation. * * *."

Within the time specified in the act, Johns brought an action against the State of Ohio in the Court of Claims for damages based upon unlawful incarceration by the state. The state filed a motion for summary judgment on the basis that no genuine issue of any material fact existed and that defendant was entitled to judgment as a matter of law. In the motion, the state claimed that the facts showed that the incarceration was not unlawful in that Johns had been incarcerated pursuant to a valid court order, and that, in order for a person to maintain a claim for unlawful incarceration, it must be shown that the order was void. The state contended that the order was not void, but only voidable as Johns' release was granted on the basis that he was deprived of his constitutional right to effective assistance of counsel, not upon the basis that the trial court lacked jurisdiction over the subject matter of his person. The trial court granted the state's motion for summary judgment, which was reversed by this court in a prior appeal by decision rendered December 21, 1978, where we stated that Johns' cause of action was granted by way of special legislation which provided a cause of action with potential relief for claimant in a type of cause which otherwise has consistently resulted in a denial of relief. The case was remanded to the Court of Claims to consider the rights of Johns in light of the special legislation enacted which created his cause of action. We did not decide whether the judgment of the Sixth Circuit Court of Appeals was *res judicata* for purposes of the issue of unlawful incarceration, but remanded it to the trial court for an initial determination of whether Johns has been unlawfully in-

carcerated either by virtue of the determinative effect of the federal court decision or by proof by other evidence, if necessary.

Upon remand, plaintiff offered no proof of liability other than the judgment of the Sixth Circuit of Appeals, granting the writ of habeas corpus, releasing plaintiff from imprisonment together with proof that plaintiff has never again been tried or lawfully convicted of the offense with which he was charged. The remainder of plaintiff's proof pertained to damages caused by his incarceration.

The Court of Claims again granted judgment for defendant finding that plaintiff has failed to prove that the state had breached any duty to him. Plaintiff has appealed, setting forth the following assignments of error:

> "I. The trial court prejudicially erred in failing to follow the mandate of the Ohio Legislature required by Sec. 41 of Am. Sub. Senate Bill 221,
>
> "(A) By failing to follow such legislation which limited its inquiry to the question of 'whether, (rather than 'how' or 'why') appellant had been unlawfully incarcerated by the State of Ohio.
>
> "(B) In concluding that appellant 'had no lawful cause of action.'
>
> "(C) Inconsistently concluding that the appellant had failed to prove by a preponderance of the evidence that he was unlawfully incarcerated despite the court's conclusion that: 'the final order upon a writ of habeas corpus * * * discharging the plaintiff * * * constitutes determination that the prisoner was improperly restrained * * *; this determination is also res judicata on that point.'

"II. The trial court prejudicially erred in failing to follow the mandate of the Court of Appeals, case No. 78-AP-474, Tenth District of Ohio, and in concluding that 'appellant had no lawful cause of action', despite Sec. 41 of Am. Sub. Senate Bill 221, and despite the trial court's conclusion that 'the prisoner was improperly restrained.'

"III. The trial court prejudicially erred,

"(A) In failing to find that the United States Sixth Circuit Court of Appeals' order granting appellant's petition for a writ of habeas corpus forthwith was lawfully issuable solely because appellant had been unlawfully incarcerated by the State of Ohio in violation of his constitutional rights to due process.

"(B) In refusing to grant leave to file (thereby overruling) and failing to consider appellant's motion for a limited summary judgment as well as appellant's supplemental brief seeking a finding as a matter of law that appellant had been unlawfully incarcerated by the State of Ohio.

"(C) In failing to fully comply with appellant's motion for complete findings of fact and conclusions of law, particularly requests therein numbered 4, 5, 6, 7, 8, 9, and 10, and, in finding as relevant the reasons of 'how' and 'why' the State of Ohio had incarcerated appellant.

"(D) In failing to find from the evidence and applicable laws that appellant had been unlawfully incarcerated by the State of Ohio as a matter of law.

"IV. The trial court erred in failing to find that the appellant was entitled to recover damages for six and one-half (6-1/2) years of unlawful incarceration by the State of Ohio as reflected by the evidence."

Plaintiff's assignments of error are combined for discussion, as they are interrelated.

The crucial issue is whether the judgment of the United States Sixth Circuit Court of Appeals, granting habeas corpus relief to plaintiff, is *res judicata* as to the issue of whether Johns was unlawfully incarcerated by the State of Ohio. If so, the Court of Claims erred in not finding that the state was liable for damages to Johns pursuant to the special legislation enacted on his behalf.

As we noted in the prior appeal, absent the special legislation, there is no liability on the part of the state in the Court of Claims to compensate a prisoner who has been placed in jail by a court of this state, having subject matter jurisdiction over him, even though the prisoner may later be released as a result of a writ of habeas corpus being issued for violation of his constitutional right, i.e. *Tymcio v. State* (1977), 52 Ohio App. 2d 298. However, in this case, the state has agreed through special legislation to be liable to Johns only upon proof of unlawful incarceration. Appellant was granted a writ of habeas corpus in federal court because he was deprived of his constitutional right to effective assistance of counsel. *Johns v. Perini* (1972), 462 F. 2d 1308. Appellee argues that, since Johns' release was occasioned by the ineffectiveness of his privately retained counsel, the writ of habeas corpus does not establish an unlawful incarceration by the State of Ohio. Appellee is incorrect in that contention. The United States Supreme Court has recently held as follows:

> "* * * If a defendant's retained counsel does not provide the adequate legal assistance guaranteed by the Sixth Amendment, a serious risk of injustice infects the trial itself. When the State obtains a conviction through such a trial, it is the State that unconstitu-

tionally deprives the defendant of his liberty. Thus, there is no merit to petitioner's claim that failings of retained counsel cannot provide the basis for federal habeas corpus relief." *Cuyler v. Sullivan* (May 12, 1980), 48 U.S.L.W. 4517.

Federal jurisdiction in a habeas corpus proceeding is conferred by the allegation of unconstitutional restraint. *Fay v. Noia* (1963), 372 U.S. 391.

A point of law or fact which was actually and directly in issue in a former action between the same parties may not be relitigated but is binding in a subsequent action. *Trautwein v. Sorgenfrei* (1979), 58 Ohio St. 2d 493. The issue of unlawful incarceration was determined against the State of Ohio in the habeas corpus action.

Thus, by virtue of the binding effect of the determination of unlawful incarceration in the habeas corpus action, there was proof by a preponderance of the evidence that appellant was unlawfully incarcerated by the State of Ohio and the trial court failed to follow the mandate of the Ohio General Assembly in concluding that appellant had no lawful cause of action.

The Court of Claims did not consider the amount of damages to be awarded as compensation since judgment was granted for defendant on the issue of liability. The case is remanded to the Court of Claims for a determination of the dollar amount of damages to be awarded as compensation pursuant to the mandate of the Ohio General Assembly in the special legislation enacted for the benefit of appellant.

Appellant's assignments of error are sustained. The judgment of the Court of Claims is reversed and the case

is remanded to the Court of Claims for further proceedings consistent with this decision.

Judgment reversed and remanded.

STRAUSBAUGH, *P.J.*, and REILLY, *J.*, concur.

STRAUSBAUGH, *P.J.*, concurring separately.

While I concur in the decision and judgment herein based upon the finding of wrongful incarceration by the Federal District Court and the bill enacted by the state legislature, the result of this decision deserves the following comments.

In *Cuyler v. Sullivan* (May 12, 1980), 48 U.S.L.W. 4517, the United States Supreme Court stated that the vital guarantee of the Sixth Amendment demands that defendant not lose his constitutional protection merely because the defendant decided to retain a particular lawyer in his defense. A defendant's right not to be convicted when his interests have been substantially left unprotected by the inadequate assistance of counsel is clear. However, the constitutional protection of the defendant is limited to the extent of preventing improper convictions. Absent a statute, such as the one found in this case allowing the plaintiff to pursue his claim against the state in the Court of Claims, a defendant has no common-law claim against the state for damages after he has obtained a writ of habeas corpus for violation of his constitutional rights. *Tymcio v. State* (1977), 52 Ohio App. 2d 298.

In *Cuyler*, the United States Supreme Court held that the state's conduct of the criminal trial itself implicates the state only to the extent of reversing a defendant's conviction. *Cuyler* did no more than that and did not imply that the state should be liable to any defendant for damages.

The Bill enacted by the Ohio General Assembly, allowing plaintiff to bring a cause of action against the state, goes much further than *Cuyler* and implicates the state in the damages arising from the failure of the plaintiff's *privately retained counsel* to properly protect the interest of the plaintiff.

By its actions, the state legislature has established a dangerous precedent of compensating criminal defendants whose convictions were a result of the failures of privately retained counsel. The state, in this case, had only performed its duty in prosecuting a defendant against whom an indictment had been returned by a Grand Jury. After a conviction, proper on its face, the conviction was overturned. Any remedy for damages to this plaintiff should be brought against the privately retained counsel who failed to give plaintiff adequate assistance of counsel at plaintiff's trial, rather than imposing a burden upon the taxpayers of this state.

For the foregoing reasons, I concur in the judgment herein.

SUPPLEMENTAL OPINION OF THE COURT OF CLAIMS OF THE STATE OF OHIO

(Filed November 7, 1979)

Case No. 78-0228

IN THE COURT OF CLAIMS
STATE OF OHIO

FRANK L. JOHNS,
Plaintiff,

vs.

STATE OF OHIO,
Defendant.

SUPPLEMENTAL OPINION

The plaintiff has filed a motion with the Court for a more complete findings of fact and conclusions of law, specifically conclusions with respect to what the plaintiff deems the issues in this case. The Court does not agree that all eleven questions presented are the issues, but will accede to the request in part, at least nine questions raised by the plaintiff alluding to the U. S. Court of Appeals case. Therefore, this Court, under authority of Rule 44.1 of Ohio Rules of Civil Procedure, takes judicial notice of the case of *Johns v. Perini* (*66 - O.O. 2d - 69*), as the *decisional* and *constitutional* law relating to this case.

As an additional finding of fact, this Court finds that *from the facts before* that court, the U. S. Court of Appeals on June 21, 1972 determined the constitutional fairness of the proceedings which resulted in the imprisonment of the plaintiff herein, finding that the plaintiff was deprived of his constitutional right to the effective assistance of counsel.

ADDITIONAL CONCLUSIONS OF LAW

1. The final order upon a writ of habeas corpus (in this case discharging the plaintiff as a prisoner), constitutes a determination that at that time (no re-trial had in this case) the prisoner was improperly restrained, and shall not be again restrained; this determination is also res judicata on that point.

2. Under Ohio law, habeas corpus actions on constitutional or grounds of trial court's errors must fail and instead must be raised by appeal. (See *Henderson v. Maxwell, Warden 176 - O.S. - 187*). Our record herein is silent as to any such evidence in any appellate proceedings in Ohio.

3. The State of Ohio waived its immunity on January 1, 1975; stare decisis is minimal. New York State has had a Court of Claims for more than thirty years with laws similar to Chapter 2743 of the Revised Code of Ohio. A historic claims case, *Natasi v. State (86 N.Y.S. 2d - 635)*, decided on January 21, 1949 is closely aligned to the legal questions raised herein.

Natasi obtained a judgment against the State of New York in the Court of Claims wherein it was shown that Natasi had been released from imprisonment on a writ of habeas corpus issued by the New York Supreme Court, that Court finding:

> "that said arrest and false imprisonment was illegal and actionable by reason of the fact that at said time and times claimant was under no obligation to serve any further time on account of any sentence which had been imposed against him by any Court . . . . had expired . . . ., and that as a consequence, his arrest, imprisonment and detention in prison was unlawful, illegal, improper and a trespass upon his rights."

The case was appealed to the Supreme Court, Appellate Division (90 N.Y.S. 2d - 377), and in a 3 to 2 decision, the judgment was reversed on the law alone and dismissed the claim, holding:

"1. Determination by Appellate Division in habeas corpus proceeding that prison sentence had expired prior to certain date was binding on that point in proceedings on claim against state for false arrest and imprisonment, whether under doctrine of res judicata, stare decisis or case law."

"2. Where there was nothing to indicate to arresting officers and confining authorities that declaration of delinquency and warrant for claimant's arrest were not valid on their face when issued, arresting officers and confining authorities were not obligated to institute an inquiry as to their validity before complying with declaration and warrant, and in carrying them out they did not subject themselves or State to an action for false arrest and imprisonment, notwithstanding subsequent determination in habeas corpus proceeding that declaration and warrant were invalid."

The case was then appealed by Natasi to the state's highest court, its Court of Appeals (See 300 - N.Y. - 473) which affirmed the decision of the Appellate Division unanimously. (7 judges). This decision still stands.

4. Since the legislature has mandated this case to the Claims Court "notwithstanding the provisions of R. C. 2743", this is a tort action. For an injury to constitute actionable tort, there must be a legal duty imposed by statute, ordinance, or by the principles of the common law owing by one committing the injury to one injured which

he has failed to perform. In *McCord v. Ohio Division of Parks* (*54 - O.S. 2d - 72*) at page 74 is found:

> "state immunity statutes do not create a new right of action against the state, but places the state upon the same level as any private party."

Until the legislature enacts statutes dictating this state to "make whole" all persons confined wrongfully or improperly in its penal institutions regardless of cause, or, as in this case, regardless of who committed the wrong other than the state resulting in the 'unlawful incarceration', this Court can only conclude, from the evidence herein, that whatever rights plaintiff had in habeas corpus did not include that he be compensated, absent a showing of any legal right of recovery against the State of Ohio. Damnum absque injuria.

/s/ A. Ross Silverling
Judge

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO

(Dated July 22, 1981)

No. 80-1450

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

FRANK L. JOHNS,
Appellee,

vs.

STATE OF OHIO,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR FRANKLIN COUNTY

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court that a mandate be sent to the Court of Claims to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

ORDER OF THE SUPREME COURT OF OHIO ON REHEARING

(Dated September 16, 1981)

No. 80-1450

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

FRANK L. JOHNS,
Appellee,

vs.

STATE OF OHIO,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

Opposition

1

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ALEXANDER L. STEVAS,
CLERK

CASE NO. 81–1111

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FRANK L. JOHNS,
Petitioner,

v.

THE STATE OF OHIO, and
THE SUPREME COURT OF OHIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT STATE OF OHIO IN OPPOSITION

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QUESTION PRESENTED

DID THE SUPREME COURT OF OHIO ACCORD TO PETITIONER A HEARING WITHIN THE MEANING AND REQUIREMENT OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

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CASE NO. 81–1111

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FRANK L. JOHNS,

Petitioner,

v.

THE STATE OF OHIO, and
THE SUPREME COURT OF OHIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT STATE OF OHIO IN OPPOSITION

OPINIONS BELOW

Set forth in the Appendix to this brief are the initial opinion of the Ohio Court of Claims and the initial decision of the Court of Appeals for Franklin County, Ohio. These two decisions were omitted from the Appendix of petitioner.

STATEMENT OF THE CASE

Respondent State of Ohio is largely in agreement with the Statement of the Case set out by petitioner. However, this respondent deems it necessary to, at this time, correct several inaccuracies appearing in petitioner's statement.

Contrary to petitioner's assertion, at no point in these lengthy proceedings has any court determined that, at the time of the offense for which petitioner was imprisoned, he was in fact on the job. Nor has any court held that employment records "would have presented a complete defense to the charges." Rather, the Sixth Circuit Court of Appeals in **Johns v. Perini** (C.A. 6, 1972), 462 F.2d 1308, stated the following at pages 1314-1315:

> ". . . (The facts) establish that the (petitioner's trial) lawyer made no more than a cursory inquiry over the telephone of a person unidentified at the evidentiary (U.S. District Court) hearing, and then abandoned the only defense available to his client.
>
> "This singular omission becomes all the more significant in the light of the testimony of the payroll department manager who stated that in addition to the document produced at trial by Johns (pay stub), there were time cards that would have shown a time punched in and a time punched out. These cards were available and amenable to examination and subpoena at the time of John's trial and they *might have shown* that he worked on the evening of November 30, 1964 on his assigned third shift from 11 p.m. until 7:30 a.m.
>
> "*If* this fact had been established, or more precisely, *if* the time cards had created a reasonable doubt about it in the minds of the jury, Johns would not as of this time

> have served more than six years and would not now face the possibility of more than 50 additional years of incarceration." (Emphasis and Bracketed Material Added.)

In addition, petitioner embellishes the facts considerably when he asserts that the Ohio General Assembly enacted special legislation because it was "so outraged by the entire circumstances" surrounding petitioner's conviction and incarceration. The history of this special state legislation is not a matter of record, and one may only speculate as to the collective sentiments of the Ohio General Assembly at the time the law was enacted.

Likewise, it is sheer speculation to conclude that the Ohio General Assembly was "so clearly confident concerning the inevitable outcome of the litigation" simply because that body provided a source of funds to satisfy a judgment which might be rendered in favor of petitioner.

Finally, it is inaccurate to state that the Ohio Court of Claims twice "undertook to dismiss the case," concluding that "petitioner had no case to try."

In its initial opinion (Respondent's Appendix A-7), the Court of Claims held that the decision of the Sixth Circuit Court of Appeals in **Johns v. Perini**, *supra*, 462 F.2d 1308, did not constitute *res judicata* on the issue as to whether petitioner was unlawfully incarcerated by the State of Ohio. The court further determined that the trial court which sentenced petitioner had jurisdiction of the subject matter and of petitioner's person and thus, as a matter of state law, petitioner's incarceration could not make the respondent State of Ohio liable for the tort of false imprisonment, or unlawful incarceration. The court therefore granted summary judgment in favor of respondent State of Ohio.

Upon appeal, the Court of Appeals for Franklin County remanded the case for a full hearing on all the evidence (Respondent's Appendix A-1).

After the trial was concluded, the Court of Claims took the case under advisement and subsequently issued its second opinion, concluding that petitioner had not proven that respondent State of Ohio committed a wrong resulting in his incarceration and that petitioner had not demonstrated a legal right of recovery against this respondent (Petitioner's Appendix A17).

SUMMARY OF ARGUMENT

The essence of substantive Due Process is protection against arbitrary action and the assurance of a standard of reasonableness. **Wolff v. McDonnell,** (1974) 418 U.S. 539. This Court has refused to interfere with the decisions of state courts construing state statutes unless such judgments amount to mere arbitrary or capricious exercises of power. **Hebert v. Louisiana,** (1927) 272 U.S. 427. In construing the special state legislation here involved the exercise of power by respondent Supreme Court of Ohio was neither arbitrary nor capricious.

The guarantee of Equal Protection of the laws means, in general, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in like circumstances, in their lives, liberty and property. **Truax v. Corrigan,** (1921) 257 U.S. 312. Petitioner, as the beneficiary of special state legislation, was the first former prisoner in Ohio history to be granted the right to bring a tort action for unlawful incarceration against respondent State of Ohio, this despite the fact that the applicable statute of limitation had long since expired.

Accordingly, petitioner is unable to show that other individuals, similarly situated, have been treated in a more favorable manner, or that the decision of respondent Supreme Court of Ohio, holding that he had not established his unique cause of action, constituted invidious discrimination.

ARGUMENT

The sole issue presented by this petition is whether or not the Supreme Court of Ohio accorded petitioner a hearing within the meaning and requirement of Due Process of law and Equal Protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Due Process clause of the Fourteenth Amendment not only accords procedural safequards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions. **Harrah Independent School District v. Martin,** (1979) 440 U.S. 194.

Procedural Due Process requires, at a minimum, that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. **Mullane v. Central Hanover Bank and Trust Co.,** (1950) 339 U.S. 306. The essence of substantive Due Process is protection against arbitrary action and the assurance of a standard of reasonableness. **Wolff v. McDonnell,** *supra,* 418 U.S. 539.

The guarantee of Equal Protection of the laws means, in general, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in like circumstances, in their lives, liberty and property. **Truax v. Corrigan,** *supra,* 257 U.S. 312.

Petitioner does not deny he was given fair notice that respondent Supreme Court of Ohio would hear the appeal of respondent State of Ohio in this matter. Nor does petitioner deny that he was afforded the opportunity to file a brief supporting his position, and to present oral argument before respondent Supreme Court of Ohio. Petitioner's generalized due process argument is apparently directed at an alleged denial of substantive, rather than procedural, Due Process.

This Court has held on a number of occasions that the Due Process clause of the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires, nor does it enable the Court to revise the decisions of the state courts on questions of state law. This Court has refused to interfere with the decisions of state courts construing state statutes unless such judgments amount to mere arbitrary or capricious exercises of power. **Hebert v. Louisiana,** *supra,* 272 U.S. 312; **Buchalter v. New York,** (1943), 319 U.S. 427.

In the present case the respondent Supreme Court of Ohio was asked to determine whether petitioner had established, pursuant to the requirement of the special state legislation, that he had been unlawfully incarcerated by respondent State of Ohio. Respondent Supreme Court simply decided that petitioner had failed to adduce proof on this issue, holding that the federal appellate court decision to issue a writ of habeas corpus for petitioner's release from prison was not *res judicata* upon the issue.

Petitioner contends that respondent Supreme Court of Ohio denied his Due Process and Equal Protection guarantees by formulating, as a basis for its decision, purely fictitious and spurious issues, having no relation to any aspect of petitioner's case presented at any level of the proceedings.

Respondent State of Ohio submits that review of the two trial court opinions (Respondent Appendix A-7, Petitioner Appendix A17) as well as the two decisions by the Court of Appeals for Franklin County (Respondent Appendix A-1, Petitioner Appendix A9) reveals that the effect of the federal appellate court's writ upon the first condition imposed by the special state legislation has always been the single most important issue before the Ohio courts. Petitioner has had ample opportunity to argue his position in this regard, and indeed prevailed upon this very point in the Court of Appeals for Franklin County.

Petitioner cannot establish jurisdiction of this Court to hear his petition simply by criticizing the decision of respondent Supreme Court of Ohio. In construing the special state legislation here involved the exercise of power by respondent Supreme Court of Ohio was neither arbitrary nor capricious, and therefore, petitioner's Due Process argument must fail.

Petitioner's Equal Protection argument is also without merit. Under the Constitution of the United States, all persons have the right to be governed by general rules, since equality of rights and privileges, and not the granting of special privileges, is the aim of the law. However, the Equal Protection clause of the Fourteenth Amendment will not be infringed by special legislation so long as all persons subjected to such special legislation are treated alike under like circumstances and conditions.

Petitioner, as the beneficiary of special state legislation, was the first former prisoner in Ohio history to be granted the right to bring a tort action for unlawful incarceration against respondent State of Ohio, this despite the fact that the applicable statute of limitation had long since expired. Accordingly, petitioner is unable

to show that other individuals, similarly situated, have been treated in a more favorable manner, or that the decision of respondent Supreme Court of Ohio, holding that he had not established his unique cause of action, constituted invidious discrimination. On the contrary, it is apparent that all other Ohio prisoners who have in the past been released from incarceration pursuant to federal court writs of habeas corpus and who have *not* been the beneficiaries of such special state legislation have been treated in a *less* favorable manner.

CONCLUSION

Petitioner has failed to demonstrate that the final judgment of respondent Supreme Court of Ohio violated or denied to him any title, right, privilege or immunity guaranteed by the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of this Court pursuant to Title 28, Section 1257(3) of the United States Code has therefore not been established.

Respectfully submitted,

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APPENDIX

NO. 78AP-474

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

FRANK L. JOHNS,
Plaintiff-Appellant,

v.

STATE OF OHIO,
WILLIAM BROWN,
Defendant-Appellee.

DECISION
Rendered on December 21, 1978

Received Dec. 26, 1978

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For Defendant-Appellee.

HOLMES, P.J.

This appeal is from the Court of Claims where the judgment of that court dismissed the claim of Mr. Johns, the plaintiff, on a motion by the defendant for summary judgment, on the basis that the plaintiff had not stated a claim for relief.

The facts in brief that gave rise to this original action, and to this appeal, are that the plaintiff-appellant was charged, tried and found guilty in Cuyahoga County Court of Common Pleas of possessing and selling, on the 30th day of November, 1964, a certain amount of marijuana. The appellant was, after being found guilty, sentenced pursuant to law for consecutive sentences totaling from thirty to sixty years' imprisonment, and sent to the Marion Correctional Institution. Mr. Johns did spend some six and one-half years in such prison.

After instituting an original action of habeas corpus in the United States District Court for the Northern District of Ohio, and upon appeal thereof, the United States Court of Appeals for the Sixth Circuit in the case *Johns v. E. P. Perini* (1972), 462 F. 2d 1308, found that Mr. Johns in the state trial of his case had not been afforded adequate representation by legal counsel and did not have a fair trial, and had been denied due process of law. The appellant's petition for a writ of habeas corpus was accordingly granted.

It appears from the decision of the Court of Appeals in the Sixth Circuit that the finding of inadequate representation by counsel was in the main based upon the fact that Mr. Johns had asserted that he was at his place of employment at the time of the crime for which he was charged, that he wanted to assert this fact as an alibi defense, that the defense counsel had not complied with the court rule for giving advance notice of the alibi, and that defense counsel had not obtained certain employment records which were than available, which tended to corroborate the alibi.

After Mr. Johns had been released from the Marion Correctional Institution pursuant to the issuance of the writ of habeas corpus, he proceeded in what was quite a unique approach in seeking redress from the state. He went to the Ohio General Assembly and successfully sought the passage of special legislation by way of Amended Substitute Senate Bill No. 221, which bill provided as follows:

> "Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio, 44105, is hereby authorized to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses and general damages resulting from his alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine (1) whether the preponderance of the evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by the State of Ohio, and if this is so, (2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any award for damages made to Mr. Johns by the Court of Claims. Such claim for damages must be filed prior to July 1, 1979, after which date the authority to file such claim shall expire."

Mr. Johns thereafter, pursuant to such act, brought an action against the State of Ohio in the Court of Claims claiming unlawful incarceration by the state and claiming damages based upon loss of freedom, loss of income and earnings, and loss of the normal relationship with his family.

The state thereafter filed a motion for summary judgment on the basis that no genuine issue of any material fact existed, and that the defendant was entitled to a judgment as a matter of law.

The state in such motion claimed that the facts show that the incarceration was not unlawful in that Mr. Johns had been incarcerated pursuant to a valid court order, and that in order for a person to maintain a claim for unlawful incarceration it must be shown that the order was void.

Further, the state argued that merely because the person who was incarcerated was later released upon a writ of habeas corpus, such does not render the original order void, but only voidable. Accordingly, the state asserted that Mr. Johns' release by the United States Court of Appeals for the Sixth Circuit was granted on the basis that he was deprived of his constitutional right to effective assistance of counsel, not upon the basis that the trial court lacked jurisdiction over the subject matter of the person. The state concluded that the plaintiff's habeas corpus release only had the effect of rendering the original judgment voidable, not void.

The plaintiff filed a motion for a limited summary judgment, i.e., that based upon the order of the United States Court of Appeals of the Sixth Circuit in the case of *Johns v. Perini,* there must be a finding by the Court of Claims that Mr. Johns was unlawfully incarcerated by the state of Ohio.

The judge of the Court of Claims, construing the motions for summary judgment, framed the stance of the case as follows: "In order to find for plaintiff it is necessary for the facts to show by a preponderance that Johns' conviction was void. This the judgment of the United States Sixth District Court of Appeals does not show, even by a scintilla."

The court then proceeded to hold the judgment of conviction of Mr. Johns was voidable and not void, in that the Cuyahoga County Common Pleas Court "had jurisdiction of the person and the subject matter." The court then likened this case to that of *Tymcio v. State* (1977), 52 Ohio App. 2d 298, in which case the Court of Claims had denied the complaint of the plaintiff for damages due to claimed unlawful incarceration. Such ruling of the court had been on the basis that the defendant's incarceration in that case was pursuant to an order of the court of competent jurisdiction following the plaintiffs's conviction of the crime, the same stance that the Court of Claims took in the instant case.

We must reverse the Court of Claims. In this matter, unlike the other cases where we have considered appeals of those who have been denied claims for alleged unlawful incarceration, we are dealing with a claimant whose cause of action has been granted by way of special legislation. This special legislation by which this plaintiff brought his cause of action within the Court of Claims did a number of things. One, it in effect waived the statute of limitations found within the Court of Claims Act. Secondly, it mandated the Court of Claims to proceed with the hearing of this case in a very specific manner. Thirdly, and most fundamentally, the bill provided a cause of action with potential relief for the claimant, in a type of cause which the Court of Claims, and this court, has consistently denied relief. See *Tymcio v. State, supra.*

Whether the decision of the Sixth Circuit Court of Appeals in effect held the judgment of conviction void or voidable, or whether such judgment is *res judicata* for the purposes of the issues raised herein, will not be discussed at this time in that it is not necessary to do so. The Court of Claims, and this court, must consider the rights of this particular claimant in light of the special legislation enacted which creates his cause of action.

The legislation dealt with here is very clear as to the duty of the Court of Claims. The court must, according to the wording of the bill, first hear all of the evidence in support of the claim, and it then must determine "whether the preponderance of the evidence offered supports a finding that Mr. Johns had been unlawfully incarcerated by the State of Ohio."

Further, if the court so finds upon all of the evidence adduced that Mr. Johns was unlawfully incarcerated, then the court must determine dollar amount damages to be awarded as compensation. Here, the Court of Claims decided this cause upon summary judgment, and did not permit plaintiff to submit any evidence upon the issue of unlawful incarceration. How then can it be said that the legislative mandate to hear all of the evidence and determine by the preponderance of the evidence whether Mr. Johns had been unlawfully incarcerated has been carried out? We must hold that the reasonable intent of the legislative enactment was for the Court of Claims to entertain and review the evidence on the issue of the unlawful incarceration, and to make its determination as to whether justice had been done in the trial of the cause of Mr. Johns. We must hold that the special act has not been complied with by the trial court as to the determination that was sought by the legislative enactment.

Therefore, we must reverse, but in so doing do not sustain all of the assignments of error. We hereby sustain the fifth and sixth assignments of error, and overrule the first, second, thrid, fourth and seventh assignments of error.

Accordingly, the judgment of the Court of Claims is hereby reversed, and this matter is hereby remanded for further proceedings according to Amended Substitute Senate Bill No. 221, and in accordance with other applicable provisions of law.

WHITESIDE and REILLY, JJ., concur.

CASE NO. 78-0228

IN THE COURT OF CLAIMS OF OHIO

FRANK L. JOHNS

Plaintiff

v.

STATE OF OHIO

Defendant

OPINION

Filed June 16, 1978

Received June 16, 1978

I

This complaint was authorized to be filed by virtue of Section 41 of Amended Substitute Senate Bill, eff. November 23, 1977, 112th General Assembly. The Claim is for damages:

> ". . . .for *unlawful incarceration* and for lost wages, legal expenses and for general damages resulting from his alleged *unlawful incarceration.* The Court of Claims. . . .shall determine (1) whether the preponderance of the evidence offered supports a finding that Mr. Johns has been *unlawfully incarcerated by the State of Ohio,* and if this is so, (2) the dollar amount of damages to be awarded as compensation. . . . ."

Of the allegations in the petition the defendant admits the jurisdictional allegation. It is also admitted that plaintiff was tried for possession for sale and sale of marijuana by the State of Ohio and sentenced 10 to 20 years and 20 to 40 years consecutively a total of 30 to 60 years. That he served 6 and one half years of the sentence imposed.

Defendant filed a motion for summary judgment on the ground that no genuine issue of any material fact exists and that defendant is entitled to judgment as a matter of law. This applies to number (1) item of the legislation relating to unlawful incarceration by the State of Ohio. If lawful plaintiff would be entitled to no damages. The plaintiff has filed a motion for partial summary judgment. If he prevails additional evidence regarding damages would necessarily be required before a money judgment could be entered.

Attached to defendant's memorandum as evidence is an affidavit annexed to the case report of *Johns v. Perini* U.S.C.A. Sixth Circuit (6-21-72). The report appears in 462 Federal Reporter 2d series pp. 1308-1315 inc. The judgment of the Federal District Court was reversed, a prior case 440 Fed2d 577 having been remanded for further proceedings. Both counsel rely on the facts contained in 462 Fed2d report.

II

It is conceded by defendant, although denied in the answer, that plaintiff was never retried on the offense and we find such to be the fact. Further that the Circuit Court of Appeals concluded that plaintiff was at the trial, when convicted, deprived of his constitutional right to effective assistance of counsel. We quote from 464 Fed2d pp. 1314-1315:

". . . . ((The facts)) establish that the ((petitioner's trial)) lawyer made no more than a cursory inquiry over the telephone of a person unidentified at the evidentiary ((U.S. District Court)) hearing, and then abandoned the only defense available to his client.

"This singular omission becomes all the more significant in the light of the testimony of the payroll department manager who stated that in addition to the document produced at trial by Johns ((pay stub)), there were time cards that would show a time punched in and a time punched out. These cards were available and amenable to examination and subpoena at the time of John's trial and they *might* have shown that he worked on the evening of November 30, 1964 on his assigned third shift from 11 P.M. unitl 7:30 A.M.

"*If* this fact had been established, or more precisely, *if* the time cards had created a reasonable doubt about it in the minds of the jury, Johns would not as of this time have served more than six years and would not now *face the possibility* of more than 50 additional years of incarceration. The seriousness of the omission is emphasized by the fact that the employer routinely destroys time cards after five years.

. . . .

"As Chief Judge Phillips wrote in *Schaber v. Maxwell,* (7-14-65) 348 Fed2d 664,

673, (6th Circuit), 'this holding is not intended to be a reflection on the character, integrity, or professional reputation of ((the attorney)) who represented petitioner in his criminal trial. . . . We recognize that good lawyers can and do make mistakes. . . .' Nevertheless, we hold that petitioner was deprived of his constitutional right to the effective assistance of counsel. The case is remanded with instructions to grant the writ unless the time cards can be located to permit a fair retrial." (Emphasis added)

III

In order to find for plaintiff it is necessary for the facts to show by a preponderance that John's conviction was void. This the judgment of the United States Sixth District Court of Appeals does not show, even by a scintilla.

Furthermore there is nothing in that judgment which found and determined that John's, "had been denied his right to a fair trial and had been denied by the defendant due process of law," as alleged by plaintiff and reiterated in his memorandum.

The holding of the Circuit Court was that, "petitioner was deprived of his constitutional right to effective assistance of counsel." No fact appears in that determination that the prosecution induced, coerced or facilitated that deprivation in any way, shape or form.

There is nothing in the facts stated in either of John's cases 440 Fed2d 577 or 462 Fed2d 1308 to suggest that he was represented at trial by appointed counsel. It was that counsel's failure to personally check records and introduce the evidence they contained, which

in the Circuit Court's decision "abandoned the only defense available to his client."

Plaintiff's fourth argument in favor of his motion for summary judgment and against defendant's motion for summary judgment is that the Circuit Court's decision finally and conclusively determined that he was unlawfully incarcerated by the State of Ohio. That decision he claims constitutes *res judicata* in this Court and any other court. So that the only remaining question is damages. It suffices to say that this conclusion is not warranted by any fact and is plainly and palpably erroneous.

Even though the Circuit Court indicated that the evidence that John's counsel failed to introduce in the trial, when he was convicted, was not now available it did not say that if it had been introduced it would have resulted in a verdict of acquittal. It is even pure speculation as to whether his trial counsel's failure caused him to be unlawfully incarcerated.

As stated in *Tymcio v. State,* (4-21-77) 52 O.A.2d 298, 300, m.c.o. 9-9-77, a case arising in this Court in which plaintiff's counsel was also counsel for Tymcio:

> "At the outset, it is noted that plaintiff makes no contention that the State penal authorities who actually imprisoned plaintiff during the period in question acted wrongly in doing so. On the contrary, it appears that defendant's incarceration was pursuant to an order of a court of competent jurisdiction following plaintiff's conviction of a crime."

In that case, as here, the Court had jurisdiction of the person and the subject matter. The difference or

distinction between the two cases was that Tymcio's right to a fair trial and due process of law was denied him for failure of the trial court to appoint counsel to assist in his defense. *State v. Tymcio* (4-2-75) 42 O.S.2d 39, 45.

We do not find it necessary to determine whether the principles for Tymcio's failure to recover are equally applicable as to John's right to recover in this case. It is arguable, as plaintiff contends, in his third argument that the special legislation granting the right of action is more than a waiver of the two year statute within which an action must be brought under the Court of Claims act, generally. Defendant also cites *O'Neil v. State of Ohio,* (6-13-75) Ct. Cls. No. 75-0305, a case where after three and a half years of incarceration it was determined that the wrong person had been convicted. That case was decided on the same principles as *Tymcio* generally speaking.

In support of plaintiff's third argument that there is a distinction between a reversal by the Supreme Court of this state for "errors of law" and a federal court determination that a judgment of a court of this state is "void"; we only note that this is a misconception of the Circuit Court's decision as we have heretofore pointed out. The citation of syllabus 6 of *Horne v. Woolever* (12-16-59) 170 O.S. 178 to the extent that a federal court judgment operates as *res judicata* in that court it likewise operates in courts of this state is not applicable for reasons previously stated herein.

In view of our conclusion that there was no unlawful incarceration by the State of Ohio we find it unnecessary to discuss the argument pro and con as to whether or not the elements of false imprisonment should or not be applied in an unlawful incarceration case. This was discussed in plaintiff's first and second arguments.

Our concluding observation that if, as plaintiff contends, that Item (1) of the special legislation is foreclosed to this Court then the legislature enacted a useless condition as to John's right of compensation. In such event the legislature need only have enacted a law directing this Court to ascertain John's damages by reason of his six and one-half years incarceration and establish a fund from which such award was to be paid.

It was incumbent at least for plaintiff to be entitled that he prove by a preponderance that there was some neglect, default or oppression on the part of the prosecution which contributed to cause his conviction. This, the record utterly fails to do. We repeat the Circuit Court's decision never said that such was the case.

IV

The Court therefore concludes as a matter of law that the judgment of conviction of the plaintiff in the Common Pleas Court of Cuyahoga County in 1965 was voidable and not void.

The Court further concludes that passage of time has effectively eliminated a retrial of the case to determine plaintiff's guilt or innocence.

The Court further concludes there is no evidence that any agency connected with the judgment of conviction deprived plaintiff of any right either under the Constitution of the United States or of the State of Ohio.

The Court further concludes that the sole cause of the remand by the Sixth Circuit Court of Appeals to the District Court for the Northern District of Ohio was by reason of representation of plaintiff's trial lawyer which the Court found deprived him of the effective assistance of counsel.

A judgment is accordingly concurrently entered.

* * * * * * * * * * * * * * * * *

BAYNES, Judge

* * * * * * * * * * * * * * * * *

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Opposition

2

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CASE NO. 81–1111

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FRANK L. JOHNS,
Petitioner,

v.

STATE OF OHIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT SUPREME COURT OF OHIO IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE IS BINDING UPON THIS COURT.

2. WHETHER THE FAILURE TO FOLLOW THE APPLICABLE STATE LAW CONSTITUTES THE DEPRIVATION OF ANY FEDERALLY PROTECTED RIGHT.

PARTIES

Petitioner:

FRANK L. JOHNS

Respondents:

STATE OF OHIO
SUPREME COURT OF OHIO

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CASE NO. 81–1111

IN THE
SUPREME COURT OF THE UNITED STATES
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FRANK L. JOHNS,

Petitioner,

v.

STATE OF OHIO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF RESPONDENT SUPREME COURT OF OHIO IN OPPOSITION

Respondent Supreme Court of Ohio respectfully requests that this Court deny the petition for a writ of certiorari, seeking a review of the opinion of respondent court in this case. That opinion is reported *sub nom.* **Johns v. State,** 67 Ohio St.2d 325 (1981).

STATEMENT OF THE CASE

Petitioner, Frank L. Johns, was charged, tried and convicted of the possession and sale of marijuana in the Court of Common Pleas of Cuyahoga County. He was sentenced to consecutive sentences totaling from thirty to sixty years.

After exhausting his state remedies, petitioner instituted an action in habeas corpus in the federal district court. He claimed that his private attorney, whom he had personally selected, had afforded him inadequate representation by failing to properly present his claim of alibi.

The District Court dismissed the petition. It found adequate representation since counsel had telephoned petitioner's place of employment and was informed that the employment records did not show whether or not petitioner had been at work at the time of the crime.

The Court of Appeals reversed. It found that it was the duty of counsel to subpoena the time records from petitioner's employer. It remanded the case to the state court with instructions to grant the writ unless the time cards can be located to permit a fair trial. **Johns v. Perini,** 462 F.2d 1308 (1972).

The state authorities were unable to reprosecute petitioner and he was released. He had been incarcerated for six and one-half years.

The statute authorizing suits against the state provides that such suits must be commenced no later than two years after the accrual of the cause of action. Petitioner, however, was able to obtain special legislation from the General Assembly, authorizing him to file a claim against the state for his alleged unlawful incarceration. Sec. 41 of Am. Sub. S.B. No. 221, 1977 Laws of Ohio.

Petitioner instituted suit in the Court of Claims and that court granted summary judgment in favor of the state.

The Court of Appeals reversed. It found that the matter should not have been determined on a motion for

summary judgment. It stated that the Court of Claims must hear evidence in support of the claim and determine whether such evidence supported a finding that petitioner had been unlawfully incarcerated by the State of Ohio. If so the court was to determine the dollar amount of damages to be awarded as compensation.

Upon retrial in the Court of Claims, petitioner presented no evidence on the question of whether he had been unlawfully incarcerated by the State of Ohio. The Court of Claims rendered judgment in favor of the State of Ohio. It explained that the statutes waiving sovereign immunity did not create a new right of action against the state. They merely place the state upon the same level as any private party. Petitioner failed to show the breach of any legal duty by the state. He, therefore, failed to show any legal right of recovery against the state.

The Court of Appeals reversed. It stated that the special legislation entitled petitioner to relief against the state if he was unlawfully incarcerated whether or not such incarceration was caused by the breach of any legal duty by the state. The question of unlawful incarceration was determined against the state in **Johns v. Perini**, *supra*, 462 F.2d 1308, and that determination is res judicata. The court remanded the case to the Court of Claims for a determination of the amount of damages to be awarded to petitioner.

Respondent Supreme Court of Ohio reversed the judgment of the Court of Appeals. It explained that the Court of Appeals had misconstrued the special legislation. That legislation provided that the Court of Claims was to determine whether the State of Ohio was responsible for the incarceration of petitioner in such a way as to warrant the payment of public funds to him.

The Court of Claims properly determined that the State of Ohio was not so responsible. Petitioner introduced no evidence on this issue. He instead relied upon the decision in **Johns v. Perini,** *supra,* 462 F.2d 1308. That decision found no wrongdoing on the part of the state or any of its officers or employees. It found that the attorney, who was personally selected and retained by petitioner, had failed to provide him with his right to effective assistance of counsel.

ARGUMENT

I.

THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE IS BINDING UPON THIS COURT.

Petitioner does not, and could not, claim that he has any federal right to recover funds from the public treasury for his incarceration. **Weinberger v. Salfi,** 422 U.S. 749, 771-772 (1975); **Palmer v. Ohio,** 248 U.S. 32, 34 (1918). His claim is that the liability of the state was established by the special legislation and that the construction of that legislation by respondent Supreme Court of Ohio to deny liability under the facts of this case was erroneous.

Such a claim is foreclosed by numerous decisions of this Court. The highest court of a state is the final authority on the meaning of a state statute. The construction of the statute by such a court is binding upon this Court. *See, e.g.,* **Hortonville Jt. Sch. Dist. v. Hortonville Educ. Assn.,** 426 U.S. 482, 488 (1976); **Gurley v. Rhoden,** 421 U.S. 200, 208 (1975); **Aero Mayflower Transit Co. v. Bd. of Railroad Commrs.,** 332 U.S. 495, 499-500 (1947); **Minnesota ex rel. Pearson v. Probate Court,** 309 U.S. 270, 273 (1940).

Respondent Supreme Court of Ohio has construed the special legislation to create liability on the part of the state only upon the determination by the Court of Claims that there was the breach of some legal duty by the state. Petitioner failed to introduce any evidence which could possibly justify such a determination. Thus, he was entitled to no relief.

Petitioner's claim that this issue was not raised below is clearly incorrect. This was the basis upon which the Court of Claims rendered judgment in favor of the State of Ohio and it was the main argument raised by the State of Ohio in the lower state courts and in its brief in the Supreme Court of Ohio.

II.

THE FAILURE TO FOLLOW THE APPLICABLE STATE LAW DOES NOT CONSTITUTE THE DEPRIVATION OF ANY FEDERALLY PROTECTED RIGHT.

Even if this Court could find that the Supreme Court of Ohio had misconstrued the state statute, it would not benefit the petitioner. The misconstruction or failure to follow the applicable state law, in itself, does not violate any federally protected right. **Beck v. Washington,** 369 U.S. 541, 554-555 (1962); **Gryger v. Burke,** 334 U.S. 728, 731 (1948).

In **Snowden v. Hughes,** 321 U.S. 1 (1944), one of the cases relied upon by the petitioner, this Court explained that for the failure to follow state law to constitute a denial of equal protection there must be some showing of a purposeful discrimination between

persons or classes of persons. It also explained that such a showing could not be supplied by the use of epithets such as "legal malice" or "arbitrary." **Id.** at 10.

Petitioner is unable to make such a showing. He cannot show any persons or classes of persons who have been permitted to recover damages from the state in the absence of any breach of a legal duty by the state or one of its agents. The waiver of sovereign immunity did not create a new right of action against the state; it merely placed the state upon the same level as any private party. If a private party would be held liable for such conduct, the state would be liable. If a private party would not be held liable for such conduct, the state would not be liable. **McCord v. Div. of Parks and Recreation,** 54 Ohio St.2d 72, 74 (1978); **Moss v. Dept. of Natural Resources,** 62 Ohio St.2d 133, 141-142 (1980).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent Supreme Court of Ohio in Opposition was sent this 15th day of January, 1982 by United States first class mail, postage prepaid, to Edwin F. Woodle, 1560 N.E. 191 Street, North Miami Beach, Florida 33179, Attorney for Petitioner; and hand delivered to Warren M. Enders, Assistant Attorney General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Attorney for Respondent State of Ohio.

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